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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
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13 JOHN KILPATRICK, *et al.*,

14 Plaintiffs,

15 v.

16
17 US BANK, NA, *et al.*,

18 Defendants.
19

CASE NO: 12-CV-1740 W (NLS)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS WITH LEAVE TO
AMEND [DOC. 6]**

20 Pending before the Court is Defendants' motion to dismiss Plaintiffs' Complaint
21 under Federal Rule of Civil Procedure 12(b)(6). (*MTD* [Doc. 6]; *Reply* [Doc. 10].)
22 Defendants also request judicial notice of seven documents attached to their motion.
23 (*Defs.' RJN* [Doc. 7].) Plaintiffs oppose. (*Opp'n* [Doc. 9].) The Court decides the
24 matter on the papers submitted and without oral argument pursuant to Civil Local Rule
25 7.1(d)(1). For the reasons below, the Court **GRANTS** Defendants' request for judicial
26 notice, and **GRANTS** Defendants' motion **WITH LEAVE TO AMEND**.
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1 **I. BACKGROUND**

2 On November 20, 2006, Plaintiffs John Kilpatrick and Cheryl Berglund
3 (“Plaintiffs”) obtained a loan (“Note”) for \$417,000.00 from Family Lending Services
4 (“Originator”). (*Def’s RJN Ex. 1.*¹) The Note was secured by a Deed of Trust (“DOT”)
5 that was recorded on November 22, 2006. (*Id.*) The DOT identifies Originator as the
6 lender, Plaintiffs as the borrowers, and S.P.S. Affiliates as trustee. (*Id.*)

7 On August 16, 2010, NDEx West, LLC, as agent for the beneficiary of the DOT,
8 recorded a “Notice of Default and Election to Sell Under Deed of Trust” in the San
9 Diego County Recorder’s Office. (*Def’s RJN Ex. 2.*) The Notice informed Plaintiffs
10 that as of August 12, 2010, they were behind \$11,388.49 on their payments. (*Id.*)

11 On September 8, 2010, Stephen Goble, assistant secretary of Mortgage Electronic
12 Registration Systems, Inc. (“MERS”), as nominee for Originator, recorded an
13 “Assignment of Deed of Trust” in the San Diego County Recorder’s Office. (*Def’s RJN*
14 *Ex. 3.*) This assignment transferred “all beneficial interest” under the DOT from
15 Originator to “U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR BAFC
16 2007-2.” (*Id.*)

17 On September 22, 2010, China Brown, as attorney in fact for U.S. Bank
18 recorded a “Substitution of Trustee” in the San Diego County Recorder’s Office. (*Def’s*
19 *RJN Ex. 4.*) U.S. Bank substituted NDEx West, LLC as Trustee. (*Id.*)

20 On November 17, 2010, NDEx West recorded a “Notice of Trustee’s Sale” in the
21 San Diego County Recorder’s Office. (*Def’s RJN Ex. 5.*) The notice explained that
22 Plaintiffs were in default under the November 20, 2006 DOT and that NDEx would sell

23
24 ¹ The Court **GRANTS** Defendants’ motion for judicial notice. Defendants seek
25 judicial notice of seven documents, including recorded deeds of trust and notices of default or
26 trustee’s sale associated with the subject property. (*Defs.’ RJN 2-3.*) Plaintiffs do not oppose.
27 The Court may take notice of facts that are “not subject to reasonable dispute in that [they
28 are] . . . capable of accurate and ready determination by resort to sources whose accuracy
cannot be reasonably questioned.” Fed. R. Evid. 201(b)(2). Because each of Defendants’
documents is a matter of public record, the Court takes notice of each of them. See Reyn’s
Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).

1 the subject property on December 7, 2010 if Plaintiffs took no action. On March 16,
2 2012, NDEx recorded another “Notice of Trustee’s Sale” in the San Diego County
3 Recorder’s Office, establishing April 9, 2012 as the sale date. (*Def’s RJN Ex. 6.*)

4 On June 14, 2012, NDEx recorded a “Trustee’s Deed Upon Sale” in the San
5 Diego County Recorder’s Office. (*Def’s RJN Ex. 7.*) The deed indicated that NDEx
6 sold the subject property on June 8, 2012 for \$511,776.09. (*Id.*)

7 On July 13, 2012, Plaintiffs filed the instant Complaint. (*Compl. [Doc. 1].*) In
8 their complaint, Plaintiffs assert claims for (1) declaratory relief, (2) negligence, (3)
9 quasi contract, (4) violation of the Helping Families Save Their Homes Act, (5)
10 violation of the Fair Debt Collection Practices Act, (6) violation of the Business and
11 Professions Code, (7) an accounting, (8) a constructive trust, (9) wrongful foreclosure
12 and setting aside of trustee’s sale, (10) voiding or cancellation of trustee’s deed upon
13 sale, (11) quiet title, (12) breach of contract, and (13) civil conspiracy. (*Id.*)

14 The gravamen of Plaintiffs Complaint is that Defendants are not the proper
15 payee of the Note, due to several allegedly deficient transfers and assignments.
16 Plaintiffs summarizes their position as follows:

17 Under the Plaintiff’s theory of the case, it is clear that the Defendants are
18 strangers to their mortgage loan and that success upon their claims against
19 Defendants will not defeat the right of a holder in due course to enforce
20 their promissory note executed in conjunction with the home mortgage
21 loan. In effect, Plaintiff asserts that there is a proper payee of their
22 mortgage promissory not but it is not the Defendants or its agents who
23 were involved in the foreclosure upon which Plaintiff sues in the present
24 case.

25 (*Compl. ¶ 27.*) Defendants move to dismiss all Plaintiffs’ claims.

26 Plaintiffs oppose Defendants’ motion with respect to claims (1), (2), (4), (9) and
27 (11). Therefore, the Court **GRANTS** Defendants motion to dismiss with respect to
28 claims (3), (5), (6), (7), (8), (10), (12), and (13) **WITH PREJUDICE**.²

² Civil Local Rule 7.1(f.3.c) expressly provides that “[i]f an opposing party fails to file papers in the manner required by Local Rule 7.1(e)(2), that failure may constitute a consent

1 **II. LEGAL STANDARD**

2 Courts must dismiss a cause of action for failure to state a claim upon which relief
3 can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
4 tests the complaint's sufficiency. See *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d
5 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either for
6 lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
7 *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the
8 motion, a court must "accept all material allegations of fact as true and construe the
9 complaint in a light most favorable to the non-moving party." *Vasquez v. L.A. Cnty.*,
10 487 F.3d 1246, 1249 (9th Cir. 2007).

11 However, the courts are not "required to accept as true allegations that are
12 merely conclusory, unwarranted deductions of fact, or unreasonable inferences."
13 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "While a
14 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
15 allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
16 requires more than labels and conclusions, and a formulaic recitation of the elements
17 of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).
18 Instead, the allegations in the complaint must "contain sufficient factual matter,
19 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*
20 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "The plausibility
21 standard is not akin to a 'probability requirement,' but it asks for more than a sheer
22 possibility that a defendant has acted unlawfully." *Id.*

23 Generally, courts may not consider material outside the complaint when ruling
24 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
25 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically

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27 to the granting of that motion or other ruling by the court." The Ninth Circuit has held that
28 a district court may properly grant a motion to dismiss for failure to oppose. See *Ghazali v.*
Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam) (affirming dismissal for failure to file timely
opposition papers where plaintiff had notice of the motion and ample time to respond).

1 identified in the complaint whose authenticity is not questioned by parties. Fecht v.
2 Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other
3 grounds). Moreover, courts may consider the full text of those documents, even when
4 the complaint quotes only selected portions. Id. Courts may also consider material
5 properly subject to judicial notice without converting the motion into one for summary
6 judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. S. Bay
7 Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986), *abrogated on other grounds by*
8 Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104 (1991)).

10 **III. DISCUSSION**

11 **A. Application of the Tender Rule is Inappropriate Here**

12 “Under California law, the ‘tender rule’ requires that as a precondition to
13 challenging a foreclosure sale, or any cause of action implicitly integrated to the sale,
14 the borrower must make a valid and viable tender of payment of the secured debt.”
15 Montoya v. Countrywide Bank, 2009 WL 1813973, *11 (N.D. Cal. June 25,
16 2009)(citations omitted). The tender rule is not absolute and “[a] tender may not be
17 required where it would be inequitable to do so.” Onofrio v. Rice, 55 Cal. App. 4th
18 413, 424 (1997)(quoting 4 Miller & Starr, Cal. Real Estate (2d ed. 1989) Deeds of
19 Trust & Mortgages, ¶9:154)(affirming trial court’s grant of relief to plaintiff on
20 rescission claim although plaintiff failed to tender). “[I]f the action attacks the validity
21 of the underlying debt, a tender is not required since it would constitute an affirmative
22 of the debt.” Id.

23 Defendants argue that Plaintiffs cannot maintain any cause of action based on
24 the fact that Plaintiffs did not allege tender. (MTD 3.) In so doing, Defendants
25 assume the tender rule is absolute, and ignore significant authority which explains
26 otherwise. It would be inequitable to require tender here since Plaintiffs challenge the
27 interest Defendants held in the DOT, not just the procedural sufficiency of the
28 foreclosure itself. Onofrio, 55 Cal. App. 4th at 424; see also Lana v. Citibank, N.A.,
202 Cal. App. 4th 89, 112-15 (2011). Such a requirement would essentially require

1 Plaintiffs to affirm that they owe the very debt they are challenging. Id. at 112-13.

2 For the foregoing reasons, the Court **DENIES** Defendants' motion to dismiss on
3 this ground.

4
5 **B. Wrongful Foreclosure and Set Aside Trustee's Sale**

6 Under California law, the elements of an equitable cause of action for wrongful
7 foreclosure are (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully
8 oppressive sale of real property pursuant to a power of sale in a mortgage or deed of
9 trust; (2) the party attacking the sale was prejudiced or harmed; and (3) in cases where
10 the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the
11 amount of the secured indebtedness or was excused from tendering. Lona v. Citibank,
12 N.A., 202 Cal. App. 4th 89, 104 (2011). A sale of real property is illegal if the trustee
13 did not have the power to foreclose under the deed of trust. Cal. Civ. Code §
14 2924(a)(1); Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1155
15 (2011).

16 The judicially noticed documents demonstrate that Plaintiffs agreed that
17 Originator could transfer its interests in the DOT to other parties. (*Def's RJN Ex. 1.* ¶
18 20.) Such interests included, but were not limited to, the right to foreclose on the
19 property in the event of default. (*Id.* ¶ 22.) Plaintiffs defaulted on the Note. (*Def's*
20 *RJN Ex. 2.*; *Compl.* ¶¶ 69, 71.) Originator then transferred its interest in the DOT to
21 U.S. Bank. (*Def's RJN Ex. 3.*) U.S. Bank, through its trustee, initiated foreclosure and
22 exercised its power of sale under the DOT. (*Def's RJN Exs. 4-7.*) Plaintiffs raise
23 numerous arguments regarding the chain of title of the DOT, which are all contradicted
24 by the aforementioned documents. (*See Compl.* ¶¶ 142, 143, 147, 148, 149, 150, 151.)
25 Thus, the Court concludes that Plaintiffs' allegations are insufficient to show an illegal
26 or fraudulent foreclosure.

27 Plaintiffs improperly rely on U.S. Bank's securitization of the Note and DOT,
28 pursuant to the execution of trust agreements, known as Pooling and Servicing

1 Agreements (“PSA”). (Compl. ¶¶ 32-57, 146.) However, Plaintiffs were not parties to,
2 nor third party beneficiaries of, the PSA, and as such, Plaintiffs may not rely on the
3 alleged unlawful securitization to withstand a motion to dismiss. Sami v. Wells Fargo
4 Bank, No. 12-CV-108, 2012 WL 967051, at *6 (N.D. Cal. Mar. 21, 2012); Junger v.
5 Bank of Am., No. 11-CV-10419, 2012 WL 603262, at *3 (C.D. Cal. Feb 24, 2012);
6 Tilley v. Ampro Mortg., No. 11-1134, 2012 WL 33033, at *4 (E.D. Cal. Jan.6, 2012);
7 Bascos v. Fed. Home Loan Mortg. Corp., No. 11-3968, 2011 WL 3157063, at *6 (C.D.
8 Cal. July 22, 2011).

9 Plaintiffs’ allegation that the Note and DOT “were improperly pledged or sold
10 to another party, and such sales were not done in accordance with Article 3 and Article
11 9 of the California Commercial Code” is insufficient because it is a mere legal
12 conclusion unsupported by factual allegations. (Compl. ¶ 145.); Iqbal, 556 U.S. at 678.
13 Also, citing a statutory provision, without more, is insufficient to provide Defendants
14 “fair notice of what . . . the claim is and the grounds upon which it rests.” Twombly,
15 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

16 Moreover, Plaintiffs fail to adequately plead prejudice or harm. Lona, 202 Cal.
17 App. 4th at 104. Plaintiffs must demonstrate “that the foreclosure would have been
18 averted but for [the] alleged deficiencies.” Reynoso v. Paul Fin., LLC, No. 09-CV-
19 3225, 2009 WL 3833298, at *4 (N.D. Cal. Nov. 16, 2009); Ghuman v. WellsFargo
20 Bank, N.A., No. 12-CV-902, 2012 WL 2263276, at *5 (E.D. Cal. June 15,
21 2012)(“Plaintiffs would be hard pressed to show any conceivable prejudice, given
22 Plaintiffs have offered no facts to suggest the substitution of NDEx (or the allegedly
23 improper recording thereof) adversely affected their ability to pay their debt or cure
24 their default.”) Plaintiffs do not allege that foreclosure would not have occurred but for
25 the alleged defects in the chain of title. Indeed, Plaintiffs concede they were in default.
26 (Compl. ¶¶ 69, 71.)

27 For the foregoing reasons, the Court **GRANTS** Defendants’ motion to dismiss
28 on this ground.

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2 **C. Quiet Title**

3 Under California law, a quiet title action must include: (1) a description of the
4 property in question; (2) the basis for plaintiff's title; and (3) the adverse claims to
5 plaintiff's title. Cal. Code Civ. Pro. § 761.020. Plaintiffs allege that Defendants "are
6 without any right whatsoever, and . . . have no legal or equitable right, claim, or interest
7 in the Property" because of an unlawful securitization and an unlawful sale under the
8 California Uniform Commercial Code. (*Compl.* ¶¶ 164.) Those allegations are
9 insufficient to show an illegal transfer or wrongful foreclosure, as explained above.
10 Thus, Plaintiffs cannot show they are "the rightful owners of the property," and their
11 claim for quiet title fails. Kelley v. Mortg. Elec. Registration Sys., Inc., 642 F. Supp. 2d
12 1048, 1057 (N.D. Cal. 2009).

13
14 **D. Negligence**

15 Under California law, the elements of a negligence claim are (1) whether the
16 defendant owed a legal duty to plaintiff to use due care, (2) whether this legal duty was
17 breached, and (3) whether the breach was a proximate cause of plaintiff's injury.
18 Holmes v. Summer, 188 Cal. App. 4th 1510, 1528 (2010). "As a general rule, a
19 financial institution has no duty of care to a borrower when the institution's
20 involvement in the loan transaction does not exceed the scope of its conventional role
21 as a mere lender of money." Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App.
22 3d 1089, 1096 (1991). "Liability to a borrower for negligence arises when the lender
23 actively participates in the financed enterprise beyond the domain of the usual money
24 lender." Wagner v. Benson, 101 Cal. App. 3d 27, 35 (1980) (internal quotation marks
25 omitted).

26 Plaintiffs fail to adequately allege that any Defendants owe them a duty of care.
27 They allege that U.S. Bank, as trustee, "owed a duty of care to Plaintiff to discharge its
28 contractual duties under the Deed of Trust with reasonable care." (*Compl.* ¶ 87.) They

1 also allege that Wells Fargo, as servicer of the loan, “owed Plaintiff an additional
2 fiduciary duty to properly collect payments, distribute payments, debit the Plaintiff’s
3 accounts and credit the Plaintiff’s accounts” and “owed Plaintiff a duty not to assess
4 illegal, unauthorized, or improper charges and to service the mortgage of Plaintiff in a
5 commercially reasonable manner so as to not create a false default or a default not
6 based on fact.” (*Compl.* ¶¶ 89, 90.) These conclusory allegations do not show the
7 Defendants’ “involvement in the loan transaction [exceeds] the scope of [their]
8 conventional role as a mere lender of money.” *Nymark*, 231 Cal. App. 3d at 1096.
9 Moreover, they fail to show Defendants “actively participate[d]” in the financed
10 enterprise with Plaintiffs. *Wagner*, 101 Cal. App. 3d at 35.

11 For the foregoing reasons, the Court **GRANTS** Defendants’ motion to dismiss
12 on this ground.

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14 **E. Violation of the Helping Families Save Their Homes Act of 2009**

15 15 U.S.C. § 1641(g) provides that “not later than 30 days after the date on which
16 a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor
17 that is the new owner or assignee of the debt shall notify the borrower in writing of such
18 transfer.” An action for damages under § 1641(g) must be brought within one year
19 from the date of the occurrence of the violation. 15 U.S.C. §1640(e).

20 Here, Plaintiffs allege they never received the notice required by § 1641(g) within
21 the requisite 30 day time period. (*Compl.* ¶ 107.) However, Plaintiffs never allege when
22 the loan was assigned, and thus fail to allege when the 30 day time period began to run.
23 Due to this deficiency, Plaintiffs fail to establish the date by which Defendants had to
24 comply with §1641(g). Thus, the Court assumes that they received notice upon
25 recording of the assignment. (*Def’s RJN Ex. 3.*) The assignment was recorded
26 September 8, 2010, which would give Defendants until October 8, 2010 to comply with
27 the statute. Thus, at the latest, the violation would have occurred October 8, 2010,
28

1 giving Plaintiffs until October 8, 2011 to file their claim. See 15 U.S.C. § 1640(e).
2 Plaintiffs filed their claim on July 13, 2012.

3 Plaintiffs' attempts to invoke equitable tolling are unpersuasive. "Equitable
4 tolling may be applied if, despite *all due diligence*, a plaintiff is unable to obtain vital
5 information bearing on the existence of his claim." Santa Maria v. Pac. Bell, 202 F.3d
6 1170, 1178 (9th Cir. 2000) (emphasis added). Plaintiffs allegations that "they could not
7 have with reasonable diligence discovered such facts because they did not receive copies
8 of the Assignment as required by law" fail to meet this standard. (*Compl.* ¶ 110.)
9 Indeed, Plaintiffs essentially concede that Plaintiffs did not exercise any due diligence
10 "until recently when they retained counsel." (*Id.*) Plaintiffs have not plead they
11 exercised all due diligence.

12 For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss
13 on this ground.

14 15 F. Declaratory Relief

16 The Declaratory Judgment Act provides that "[i]n a case of actual controversy
17 within its jurisdiction . . . any court of the United States . . . may declare the rights and
18 other legal relations of any interested party seeking such declaration." 28 U.S.C. §
19 2201(a). In applying this provision, courts must address two issues: 1) whether there is
20 an actual controversy; and 2) whether it is proper to exercise the discretion afforded
21 under the Declaratory Judgment Act by exercising jurisdiction. American States Ins.
22 Co. v. Kearns, 15 F.3d 142, 143 -144 (9th Cir.1994).

23 In their declaratory relief claim, Plaintiffs ask for the Court to declare that with
24 the exception of Originator, none of the named Defendants or Doe Defendants have
25 any right or interest in Plaintiff's Note or Deed of Trust, in fact or as a matter of law,
26 and therefore cannot foreclose or collect Plaintiff's mortgage payments. . . . (*Compl.* ¶
27 87.) In addition, Plaintiffs insist that "[i]t is necessary for the Court to declare the
28 actual rights and obligations of the parties and to make a determination as to whether
Trustee's claims against Plaintiff is enforceable and whether it is secured or unsecured

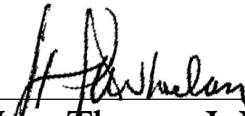
1 by any right, title, or interest in Plaintiff's Property." (*Id.* ¶ 89.) Thus, Plaintiffs'
2 declaratory judgment claim rests on the same unlawful securitization allegation as their
3 wrongful foreclosure claim. (*Id.* ¶¶ 83-90, 138-156.) As the Court concludes that
4 Plaintiffs have not stated a wrongful foreclosure claim, Plaintiffs have failed to allege an
5 actual case or controversy. 28 U.S.C. § 2201(a). As a result, the Court **GRANTS**
6 Defendants' motion to dismiss on this ground.

7
8 **IV. CONCLUSION**

9 For these reasons, the Court **GRANTS** Defendants' motion to dismiss **WITH**
10 **LEAVE TO AMEND**. [Doc. 6.] Plaintiffs' first amended complaint, if any, must be
11 filed on or before **September 26, 2013**.

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13 **IT IS SO ORDERED.**

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15 **DATED: August 26, 2013**

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19 Hon. Thomas J. Whelan
20 United States District Judge
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